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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF OREGON

11 CARA VAN HAASTERT, )  
12 )  
13 Plaintiff, ) No. CV-03-717-HU  
14 v. )  
15 )  
16 ADVANCED PAIN MANAGEMENT )  
CENTER, ) ORDER  
17 Defendant. )  
18 )  
19 )  
20 )

17 David D. Park  
ELLIOTT & PARK  
18 Abernethy House  
0324 S.W. Abernethy Street  
19 Portland, Oregon 97239-4356

20 Attorney for Plaintiff

21 Karen O'Kasey  
HOFFMAN HART & WAGNER LLP  
22 1000 S.W. Broadway, Suite 2000  
Portland, Oregon 97205

23 Attorney for Defendant

24 HUBEL, Magistrate Judge:

25 This case was set for trial in January 2005, with a pretrial  
26 conference set in December 2004. As the parties were preparing for  
27 trial, then defense counsel Scott Palmer told plaintiff's counsel  
28

1 that defendant planned on using certain expert witnesses which it  
2 had not previously disclosed to plaintiff. Plaintiff voiced her  
3 objection. Defendant then moved for "Relief from Order Setting  
4 Deadlines to Disclose Expert Witnesses and Other Relief." At a  
5 December 10, 2004 hearing on the motion, I struck the January 11,  
6 2005 trial date and reset it for April 19, 2005. I also required  
7 additional briefing on the issues of whether the witnesses  
8 identified by defendant were truly experts and thus subject to the  
9 disclosure requirements.

10 At a January 14, 2005 continued hearing on the motion,  
11 defendant substituted Karen O'Kasey as new counsel for Scott  
12 Palmer. I granted defendant's motion and allowed defendant to call  
13 the expert witnesses at the April 2005 trial. I also granted  
14 plaintiff's motion for sanctions.

15 I ordered defendant to pay the expenses plaintiff incurred in  
16 responding to the Motion for Relief from Order Setting Deadlines to  
17 Disclose Expert Witnesses and Other Relief, including the time  
18 spent preparing any written response to the motion and attending  
19 any hearing on it. I also ordered defendant to pay plaintiff for  
20 any duplicative trial preparation caused by the resetting of the  
21 trial. I ordered plaintiff to submit a detailed time record for  
22 these expenses and support for counsel's requested hourly rate. In  
23 compliance with the order, plaintiff has submitted a request for  
24 \$8,310 in fees and costs as sanctions. Defendant has responded to  
25 the request. For the reasons explained below, I grant plaintiff's  
26 request in part and award \$6,270 in fees and costs.

27 Defendant ultimately prevailed at trial and has submitted a  
28 cost bill seeking \$5,139.93 in costs. I award defendant its

1 requested costs.

2 I. Plaintiff's Fees and Costs

3 Plaintiff seeks \$7,950 in fees and \$360 in costs for a total  
4 of \$8,310. Plaintiff's counsel's hourly rate is \$200 and he  
5 indicates that he expended 26.35 hours on time spent responding to  
6 the motion and attending hearings on the motion for a total of  
7 \$5,270 in fees, and that he seeks 13.4 hours, or \$2,680 in time for  
8 work that would have to be redone as a result of the trial setover.

9 A. General Attorney Fee Standards

10 In determining a reasonable attorney's fee, the district court  
11 first calculates the lodestar by multiplying the number of hours it  
12 finds the prevailing party reasonably expended on the litigation by  
13 a reasonable hourly rate. McGrath v. County of Nevada, 67 F.3d  
14 248, 252 (9th Cir. 1995). A district court possesses "considerable  
15 discretion" in determining the reasonableness of a fee award. See  
16 Webb v. Ada County, 195 F.3d 524, 526 (9th Cir. 1999). Even absent  
17 specific objections by the opposing party, the court has an  
18 independent duty to scrutinize a fee request to determine its  
19 reasonableness. Gates v. Deukmejian, 987 F.2d 1392, 1401 (9th Cir.  
20 1993); see also Poole v. Textron, Inc., 192 F.R.D. 494, 508 (D. Md.  
21 2000) (because the award must be reasonable, it is incumbent on the  
22 district court to subject the request to an independent review to  
23 "insure that the time expended . . . was not excessive to the task  
24 and [to consider] the hourly rate charged in light of fees charged  
25 in the legal community for services of like kind and quality.").

26 B. Reasonable Hourly Rate

27 In determining the reasonable hourly rate, the court must look  
28 at the "prevailing market rates in the relevant community." Blum

1 v. Stenson, 465 U.S. 886, 895 (1984). The court determines what a  
2 lawyer of comparable skill, experience, and reputation could  
3 command in the relevant community. Id. at 895 n.11; see also  
4 Robins v. Scholastic Book Fairs, 928 F. Supp. 1027, 1333 (D. Or.  
5 1996) ("In setting a reasonable billing rate, the court must  
6 consider the 'prevailing market rates in the relevant community'  
7 and determine what a lawyer of comparable skill, experience, and  
8 reputation could command in the relevant community."), aff'd, 116  
9 F.3d 485 (9th Cir. 1997). The fee applicant has the burden of  
10 producing satisfactory evidence, in addition to the affidavits of  
11 its counsel, that the requested rates are in line with those  
12 prevailing in the community for similar services of lawyers of  
13 reasonably comparable skill and reputation. Jordan v. Multnomah  
14 County, 815 F.2d 1258, 1263 (9th Cir. 1987).

15 Plaintiff's counsel David Park is a member in good standing of  
16 the Oregon State Bar (OSB) and was admitted to practice before this  
17 Court in 1981. Park Affid. at ¶ 2. He has been practicing law  
18 since September 1980. Id. He has an undergraduate degree from the  
19 University of California at Berkeley and a law degree from the  
20 Northwestern School of Law of Lewis and Clark College which he  
21 obtained in 1980. Id.

22 He is in private practice in Portland and for the last fifteen  
23 years, has been a partner in Elliott & Park, a two lawyer  
24 litigation practice. Id. at ¶ 3. He has a general plaintiffs-  
25 oriented trial practice which emphasizes litigation in the areas of  
26 personal injury, employment law, police misconduct, construction  
27 defect, and business torts. Id. at ¶ 4.

28 His current hourly billing rate for ordinary non-contingent

1 civil litigation is \$200. Id. at ¶ 5. He is familiar with the  
2 billing rates of attorneys in the Portland metropolitan area of  
3 similar experience in employment and civil rights litigation. Id.  
4 He is also familiar with the OSB's 2002 Economic Survey of the  
5 median billing rates for lawyers in the Portland metropolitan area  
6 having practiced for more than twenty-one years. Id. He contends  
7 that in light of what is charged by similar practitioners with  
8 similar experience and what is reflected in the OSB's 2002 Economic  
9 Survey, his \$200 hourly rate is reasonable. Id.

10 Plaintiff correctly notes that the OSB 2002 Economic Survey  
11 reports that for attorneys admitted to practice for twenty-one to  
12 thirty years, the median hourly rate for those with a private  
13 practice in Portland is \$225. OSB 2002 Econ. Survey at p. 31. The  
14 average is \$227 per hour with the range from \$180 in the twenty-  
15 fifth percentile to \$320 in the ninety-fifth percentile. Id.

16 If one looks at areas of practice, the median hourly rate for  
17 a plaintiff's civil litigation attorney in Portland, excluding  
18 personal injury, is \$200, the average is \$186, with the twenty-  
19 fifth percentile at \$160 and the ninety-fifth percentile at \$263.  
20 Id. at p. 32. The rates are somewhat lower for a personal injury  
21 practice.

22 Defendant objects to the \$200 requested hourly rate.  
23 Defendant argues that the rate should be \$186 based on that part of  
24 the Economic Survey noted above, showing that the average (not the  
25 median), hourly rate for a Portland plaintiff's civil litigation  
26 attorney, excluding personal injury, is \$186 and that \$200 is above  
27 the average for this litigation.

28 I disagree. An attorney with twenty-five years of experience

1 requesting a rate based on the "experience" table rather than the  
2 "type of practice" table, and requesting a rate \$25 below the  
3 median and \$27 below the average for Portland attorneys with his  
4 years of experience, is not unreasonable. Moreover, even if I  
5 looked at the "type of practice" table, defendant gives no  
6 meaningful reason for relying on the average hourly rate of \$186  
7 instead of the median hourly rate of \$200. Finally, the figures in  
8 the survey are based on data collected in 2001 or 2002 and printed  
9 in 2002. Park's time accrued in late 2004 and early 2005 and  
10 should be compared with what those average and median rates might  
11 be now. Assuming the data was collected in 2002 and assuming a 3%  
12 inflation rate for 2003 and 2004, even the \$186 rate suggested by  
13 defendant computes to \$197.32 per hour for relevant time period.

14 \$200 per hour is a reasonable rate for Park.

#### 15 C. Hours Reasonably Expended

16 Plaintiff's counsel has organized his time into two  
17 categories. Exhibit A to plaintiff's counsel's affidavit details  
18 the time spent responding to and opposing defendant's motion and  
19 Exhibit B details the time plaintiff's counsel contends that he  
20 expended and must repeat due to the setover of the trial.

##### 21 1. Exhibit A - Response to Defendant's Motion

22 Park seeks a total of 26.35 hours for time spent responding to  
23 and opposing defendant's motion and attending two hearings related  
24 to the motion. Defendant raises certain objections.

##### 25 a. December 7, 2004 and December 8, 2004

26 Plaintiff requests a total of 12.35 hours for time spent on  
27 December 7, 2004, and December 8, 2004, largely for time reviewing  
28 defendant's motion, preparing an affidavit in opposition to the

1 motion, and researching and drafting a memorandum in opposition to  
2 the motion. I agree with defendant that the 12.35 hours should be  
3 reduced to 8.5. As defendant notes, in an affidavit filed after  
4 the first hearing on defendant's motion on December 10, 2004, Park  
5 stated that he had spent ten hours of time thus far in response to  
6 defendant's motion, including the one and one-half hours spent in  
7 the December 10, 2004 hearing. Jan. 5, 2005 Park Affid. at ¶ 6 ("I  
8 expended 10 hours of time responding to defendant's Motion for  
9 Relief from Order, inclusive of the telephone hearing time on  
10 December 10, 2004."). Thus, his representation at that time was  
11 that he had spent 8.5 hours on a response to the motion excluding  
12 the time attending the December 10, 2004 hearing. His  
13 representation there estops him from claiming an additional amount  
14 now. Thus, the time spent on December 7, 2004 and December 8, 2004  
15 is reduced from 12.35 hours to 8.5 hours.

16 I reject defendant's argument that the time spent on these  
17 dates should be further reduced to six hours because, in  
18 defendant's opinion, the motion was not complex. I note that in  
19 addition to plaintiff's memorandum initially filed opposing the  
20 motion, Park submitted a six page affidavit. Defendant's motion  
21 raised an ethical issue as well as a need for plaintiff to recite  
22 historical facts of the litigation. Moreover, the motion required  
23 research on the issue of relief from court orders and on the civil  
24 rules. I reject defendant's argument that time more than six hours  
25 is unreasonable.

26 b. January 3, 2005

27 Plaintiff seeks two hours spent on January 2, 2005, reviewing  
28 his notes from the December 10, 2004 hearing and reviewing expert

1 witness reports. Defendant argues that no time should be awarded  
2 for this entry because while there is no doubt that plaintiff  
3 reviewed the expert witness reports provided by defendant, such  
4 review instructed plaintiff in defendant's case or witnesses.  
5 Defendant contends that the information is of use to plaintiff at  
6 the time of trial and was not suffered due to defendant's need to  
7 extend the expert discovery deadline.

8 I reject this argument. First, I do not read defendant's  
9 objection as being directed at the time Park spent reviewing notes  
10 from the December 10, 2004 motion hearing and I find that such time  
11 is properly awardable. Second, I asked the parties at the December  
12 10, 2004 hearing to address in their supplemental briefing whether  
13 defendant's experts were truly expert witnesses or were lay  
14 witnesses. Park had to spend time reviewing defendant's expert  
15 reports in order to respond to this issue. It is irrelevant that  
16 the review "instructed plaintiff in defendant's case."

17 c. January 4, 2005 and January 5, 2005

18 On January 4, 2005, and January 5, 2005, Park incurred a total  
19 of 5.75 hours for (1) legal research on the issues of  
20 distinguishing expert from non-expert testimony and sanctions  
21 available for non-disclosure of expert witnesses; (2) drafting and  
22 finalizing plaintiff's objections to defendant's expert witness  
23 disclosures; and (3) preparing an affidavit in support of  
24 plaintiff's objections.

25 Defendant first objects to the requested time because the  
26 January 4, 2005 entry improperly contains a block entry that seeks  
27 4.0 hours for three separate tasks of legal research on expert  
28 versus non-expert witnesses, legal research regarding sanctions for



1 non-disclosure of an expert, and beginning the draft of objections  
2 to defendant's witness disclosures. I reject defendant's argument.

3 While the block billing is disfavored, the reason the Court  
4 frowns upon it is because it makes the Court's review for  
5 reasonableness impossible by not delineating the time spent for  
6 each task. But, here, a total of 4.0 hours is claimed for research  
7 and drafting a memorandum. The cumulative time is not  
8 unreasonable, even if I cannot apportion the individual tasks, the  
9 individual tasks are all awardable in any event, and this is the  
10 only time billed for these tasks so the fact that they are blocked  
11 billed is not the usual impediment to reviewing the total time  
12 spent.

13 Defendant also argues that time spent on the distinction  
14 between experts and fact witnesses and time spent on objections to  
15 the witness disclosures that were made, is not time related to  
16 defendant's motion. Defendant argues that none of this time is  
17 appropriate.

18 Again, I disagree with defendant. As noted above, one of the  
19 issues raised by defendant's motion was whether all of the  
20 "experts" it was belatedly disclosing, were actually experts.  
21 Defendant states that its motion was directed to "true experts" and  
22 some factual witnesses that it feared could be considered experts,  
23 and that the factual witnesses were included out of an abundance of  
24 caution. But, defendant did include those factual witnesses in its  
25 motion for relief, prompting me to request the parties to address  
26 in the second round of briefing and at the second argument in  
27 January, the issue of whether all the witnesses at issue in the  
28 motion were experts or not. Thus, plaintiff's legal research into

1 what distinguishes an expert and non-expert was directly in  
2 response to the issues raised by defendant's motion. As for the  
3 objections to witnesses, these were also asserted as a basis for  
4 opposing the motion and were related to the motion. All of the  
5 time spent on January 4, 2005, and January 5, 2005 is properly  
6 allowed.

7           2. Exhibit B - Fees Related to Trial Postponement

8           As noted above, plaintiff seeks a total of 13.4 hours for time  
9 regarding legal services attributable to the setover of the trial.  
10 Defendant again makes specific objections.

11           a. November 21, 2004 and December 4, 2004

12           On November 21, 2004, Park spent 3 hours reviewing the  
13 transcript of the summary judgment oral argument and identifying  
14 issues for motions in limine and other possible trial evidence and  
15 argument issues. On December 4, 2004, he spent 3 hours reviewing  
16 defendant's and plaintiff's document production.

17           Defendant argues that Park should not be reimbursed for this  
18 time because "[b]oth efforts advanced plaintiff's case." Defendant  
19 states that the identification of motions in limine or like issues  
20 is an identification that serves plaintiff's purposes at trial.  
21 Defendant also argues that similarly, plaintiff's review of  
22 document production brings matters up to date and is seldom wasted  
23 time. Defendant suggests that such review is a periodic thing in  
24 the preparation of any case. Defendant objects to both of these  
25 entries.

26           I disagree with defendant that the fact that the time spent  
27 advanced plaintiff's case is a valid basis for objection. The  
28 issue is whether Park had to re-expend the time in light of the

1 three-month trial setover. With that issue in mind, I agree with  
2 defendant that the 3 hours spent on November 21, 2004, reviewing  
3 the summary judgment argument and identifying motions in limine and  
4 other trial issues should not be awardable here. While the belated  
5 expert reports may have generated additional motions in limine or  
6 trial evidence issues, the delay should not have caused Park to re-  
7 spend the time initially expended on these tasks because the  
8 belated expert reports only added evidence for him to review and  
9 did not fundamentally change any of the issues generated by the  
10 evidence submitted to date.

11 However, I disagree with defendant regarding the time spent  
12 reviewing document production. A three month delay is not  
13 insubstantial and an attorney's need to have a refreshed memory  
14 about the documentary evidence is important. I do not think it  
15 unreasonable that Park would have to re-review the document  
16 production closer to the actual trial date.

17 b. December 3, 2004, and December 7, 2004

18 On December 3, 2004, Park spent .4 hours talking to his expert  
19 Dr. Robert Male regarding an updated narrative report and faxing a  
20 letter to Dr. Male along with updated information concerning  
21 plaintiff's earnings and employment. On December 7, 2004, Park  
22 spent .25 hours talking to Dr. Male regarding his revised  
23 calculation of plaintiff's wage loss based on the information Park  
24 supplied a few days earlier, and scheduling a date and time for Dr.  
25 Male's trial testimony.

26 Defendant objects to both of these entries because, defendant  
27 argues, time spent obtaining an updated narrative and providing the  
28 expert with updated information is work that was inevitably

1 required regardless of when trial would occur. Defendant contends  
2 that the time in providing recent information is not wasted time,  
3 unless plaintiff's employment situation were to change before  
4 trial.

5 I disagree with defendant. The point is that Park expended  
6 this time when the trial was still set in January 2005. If the  
7 trial had occurred as scheduled, he would not have had to resupply  
8 Dr. Male with plaintiff's most current wage and employment  
9 information for another updated report. But, because of the three-  
10 month setover, and because it is reasonable for plaintiff to  
11 present the most current information to the trier of fact regarding  
12 her damages, Park would have been forced to repeat this time closer  
13 to the trial date to obtain the most up-to-date report possible  
14 from Dr. Male.

15 c. December 9, 2004 and December 10, 2004

16 On December 9, 2004, and December 10, 2004, Park spent a total  
17 of 3.35 hours reviewing certain parts of the draft pretrial order,  
18 discussing it with Palmer, making revisions to the draft, and  
19 emailing a revised draft to Palmer.

20 I agree with defendant that this time should not be awardable.  
21 I do not find the time spent to have been "wasted" given that the  
22 belated expert disclosures did not change any of the basic facts of  
23 the case or raise any new legal issues. As defendant notes, it is  
24 common for attorneys to prepare a series of draft pretrial orders,  
25 exchange proposals, and make revisions. This is not time that  
26 would need to be entirely repeated.

27 D. Costs

28 Plaintiff seeks \$360 for charges related to Dr. Male's report.

1 Park states that plaintiff incurred the charge to prepare an  
2 updated report based upon current employment data for plaintiff in  
3 preparation for trial. Exhibit C to plaintiff's affidavit shows a  
4 December 7, 2004 invoice from Male to Park with the \$360 charge.  
5 Plaintiff argues that the charge would need to be re-incurred in  
6 March 2005 in order to have an updated report consistent with any  
7 further developments in plaintiff's employment status and  
8 compensation between when the first report was done and the new  
9 April 19, 2005 trial date.

10 Defendant objects to half of this cost. Defendant argues that  
11 while there could be need to regenerate the same report in a few  
12 months, the need to include all of the recently added information  
13 will not require preparation from scratch.

14 For the reasons discussed in the previous section, I reject  
15 defendant's argument. The point is that plaintiff would not have  
16 commissioned the updated report in December 2004 if the trial had  
17 not been set for January 2005. While I understand defendant's  
18 point that previously supplied information does not need to be  
19 resupplied, it is not unreasonable to conclude Dr. Male would still  
20 need to calculate the new information and generate an updated  
21 report in preparation for the April 2005 trial date. This cost is  
22 properly awarded to plaintiff.

#### 23 E. Conclusion Regarding Plaintiff's Motion

24 Other than the specific objections noted by defendant, I find  
25 all other time requested by plaintiff to be reasonable. Park is  
26 properly awarded time at the rate of \$200 per hour. Based on the  
27 discussion above, I deduct the following amounts of time: (1) 3.85  
28 hours for the time claimed on December 7, 2004, and December 8,

1 2004 above 8.5 hours; (2) 3 hours for time claimed on November 21,  
2 2004 for reviewing the summary judgment oral argument transcript  
3 and identifying motions in limine and other trial issues; and (3)  
4 3.35 hours for the time spent on December 9, 2004, and December 10,  
5 2004, on the pretrial order. Thus, the total number of hours  
6 claimed (26.35 and 13.4 for a total of 39.75) is reduced by 10.2  
7 hours for a total of 29.55. At \$200 per hour, the total fee award  
8 is \$5,910. With the  
9 \$360 cost, the total amount awarded to plaintiff in fees and costs  
10 is \$6,270.

## 11 II. Defendant's Cost Bill

12 Defendant seeks \$5,139.93 in costs, comprising \$20 in a  
13 prevailing party fee under 28 U.S.C. § 1923(a), and the remainder  
14 in deposition-related costs under 28 U.S.C. § 1920(2). Defendant's  
15 cost bill is supported by exhibits showing the actual costs, a  
16 memorandum in support, and an affidavit of defense counsel.

17 Plaintiff does not oppose any of defendant's requested costs  
18 as excessive or as unauthorized by statute. I find them to be  
19 authorized and reasonable. Plaintiff requests, however, that the  
20 Court exercise its discretion to reduce the amount of costs taxed  
21 against her because of her personal financial circumstances. I  
22 decline to exercise my discretion in this fashion.

23 While plaintiff's financial situation is certainly  
24 distressing, and plaintiff cites cases supporting the proposition  
25 that the court may consider indigency in considering whether to  
26 award costs, I find that in this case, justice is best served by  
27 not reducing the costs sought by defendant. I appreciate that to  
28 someone with little or no financial resources, the sum sought by

1 defendant may appear onerous. But, based on my experience as a  
2 trial lawyer and a judge, I can say with confidence that the amount  
3 sought is quite reasonable and rather small in scale. Furthermore,  
4 although civil rights litigants should not be deterred from  
5 pursuing legal action in the face of wrongdoing, to reduce or  
6 eliminate plaintiff's obligation to pay defendant's costs would  
7 result in an unfair burden to defendant which already has likely  
8 expended substantial resources on attorney's fees to defend this  
9 case. Thus, I award defendant \$5,139.93 in costs.

10 CONCLUSION

11 Plaintiff's motion for attorney's fees (#71) is granted in  
12 part and denied in part. Plaintiff is awarded \$6,270 in fees and  
13 costs. Defendant's cost bill (#121) is granted in the amount of  
14 \$5,139.93.

15 IT IS SO ORDERED.

16 Dated this 29th day of June, 2005.

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18  
19 /s/ Dennis James Hubel  
20 Dennis James Hubel  
21 United States Magistrate Judge  
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